



**IT IS ORDERED as set forth below:**

**Date: November 20, 2007**

*C. Ray Mullins*

**C. Ray Mullins  
U.S. Bankruptcy Court Judge**

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**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

IN RE:

SUNNY P. LEE,

Debtor.

CASE NO: 05-74819-CRM

CHAPTER 7

NAM HO PARK,

Plaintiff,

v.

SUNNY P. LEE,

Defendant.

ADVERSARY PROCEEDING NO.  
05-6513-CRM

**ORDER GRANTING PARTIAL SUMMARY JUDGMENT**

**THIS MATTER** is before the Court on Nam Ho Park's Motion for Summary Judgment (the "Motion"). Sunny P. Lee (the "Debtor-Defendant") filed a response to the Motion, and Nam Ho Park (the "Plaintiff") subsequently filed a reply. The Plaintiff commenced

this adversary proceeding against the “Debtor-Defendant” to determine dischargeability of debts under section 523(a)(2)(A) and (a)(6) of the Bankruptcy Code and Rule 7001 of the Federal Rules of Bankruptcy Procedure. The Plaintiff seeks an order that \$80,400.00 owed by the Debtor-Defendant to the Plaintiff be excepted from discharge.

In accordance with Rule 56 of the Federal Rules of Civil Procedure, made applicable to the Bankruptcy Courts by Rule 7056 of the Federal Rules of Bankruptcy Procedure, the Court will grant summary judgment only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED.R.CIV.P. 56(c). "Material facts" are those which might affect the outcome of a proceeding under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Further, a dispute of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. Lastly, the moving party has the burden of establishing the right of summary judgment. Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir.1991); Clark v. Union Mut. Life Ins. Co., 692 F.2d 1370, 1372 (11th Cir.1982).

In determining whether a genuine issue of material fact exists, the Court must view the evidence in the light most favorable to the nonmoving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Rosen v. Biscayne Yacht & Country Club, Inc., 766 F.2d 482, 484 (11th Cir.1985). It remains the burden of the moving party to establish the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986); see also FED.R.CIV.P. 56(e). Once the movant has made a prima facie showing of its right to judgment as a matter of law, the nonmoving party must go beyond the pleadings and demonstrate that there is a material issue of fact which precludes summary judgment. Celotex, 477 U.S. at 324.

In the Plaintiff's Statement of Undisputed Facts, the following facts with supporting exhibits and affidavits were presented. On October 15, 2004, the Plaintiff loaned the Debtor-Defendant \$20,000.00 in exchange for a post-dated check for \$20,000.00. The check was dated May 14, 2005. On March 20, 2005, the Plaintiff loaned the Debtor-Defendant \$50,000.00. On that same day, the Debtor-Defendant signed a document entitled "Certificate of Assignment," (the "Assignment") acknowledging an additional debt of \$50,000.00. The Assignment purportedly assigned all the Debtor-Defendant's rights in a certain real property to the Plaintiff as collateral. The Assignment was in writing, described the property by address, and was notarized.

Before May 14, 2005, the Debtor-Defendant borrowed an additional sum of \$10,400.00. Debtor-Defendant wrote a note acknowledging that she was unable to pay back the \$10,400.00, but that she would be able to pay during the last week of May 2005. Plaintiff deposited the \$20,000.00 check on May 14, 2005, and it bounced. In November of 2005, the Plaintiff learned that the Debtor-Defendant had no rights in the property assigned to the Plaintiff in the Assignment. Plaintiff discovered that Debtor-Defendant transferred the interest in the property referred to in the Assignment by quitclaim deed on January 15, 2005.

Both Debtor-Defendant's answer and response to the Motion do not challenge this sequence of events between the parties. The Debtor-Defendant does challenge the Plaintiff's motivation for extending the loans to the Debtor-Defendant. The Debtor-Defendant relies upon the Plaintiff's declaration and affidavit where Plaintiff described the close friendship between the parties. However, that same evidence also includes unopposed statements by the Plaintiff that she made the \$50,000.00 loan as a result of Debtor-Defendant's assignment of rights in property to serve as collateral on the loan. (Doc. No. 11, p. 7, ¶ 11). The Debtor-Defendant fails

to demonstrate that there is a material fact that precludes summary judgment without substantiating her theory. The remaining challenges from the Debtor-Defendant are not factual in nature; they are challenges to the legal conclusions presented by the Plaintiff.

The Plaintiff argues that the Debtor-Defendant's debt be excepted from discharge under all three of fraud bases for nondischargeability of section 523(a)(2)(A), in addition to nondischargeability for "wilful and malicious injury" under subsection (a)(6). Because only one basis under section 523 need be satisfied to find nondischargeability, the Court first assesses whether the debt owing to the Plaintiff was procured by actual fraud under section 523(a)(2)(A).

There is a presumption that all debts owed by the debtor are dischargeable unless the party contending otherwise proves, by competent evidence, nondischargeability. The burden is on the creditor to prove the exception. St. Laurent v. Ambrose (*In re St. Laurent*), 991 F.2d 672, 680 (11th Cir. 1993). Courts should narrowly construe exceptions to discharge against the creditor and in favor of the debtor. Equitable Bank v. Miller (*In re Miller*), 39 F.3d 301 (11th Cir. 1994); *In re St. Laurent*, 991 F.2d at 680. The burden of proof for exceptions to discharge under section 523 is the preponderance of the evidence standard. Grogan v. Garner, 498 U.S. 279 (1991).

For a finding of nondischargeability by actual fraud under section 523(a)(2)(A), a creditor must show: (1) that the debtor made a false representation with the intent to deceive the creditor; (2) that the creditor relied on the representation; (3) that the reliance was justified; and (4) that the creditor sustained a loss as a result of the representation. In re Bilzerian, 100 F.3d 886, 892 (11th Cir. 1996).

The Court assessed the required elements of actual fraud under section 523(a)(2)(A) by transaction, and finds that the March 20, 2005 exchange between the parties

meets all the requisite elements of actual fraud. The Plaintiff's loan to the Debtor-Defendant was conditioned on a false representation by the Debtor-Defendant that she was providing collateral to the Plaintiff in exchange for the loan. The Plaintiff relied on the Assignment, and she sustained a loss in the purported rights in the property since the Debtor-Defendant had no interest in the collateral when she purportedly assigned her interest to the Plaintiff.

The Debtor-Defendant challenges two of the required elements under section 523(a)(2)(A). First, Debtor-Defendant asserts that there is no fraud in this transaction because she lacked the requisite intent to deceive. The intent to defraud is rarely admitted and not always apparent on its face. Therefore, the Court looks to surrounding facts and circumstances to determine intent. Here, the Court determines that the Assignment and purported collateral were given in order to secure the loan. The Debtor-Defendant signed the Assignment that included a description of property purported to serve as collateral, and the Assignment was formalized by a notary seal. Over a year earlier, the Debtor-Defendant transferred all her interest in the property by deed. These facts and circumstances support the Courts determination that the Debtor-Defendant possessed the requisite intent to deceive regarding the March 20, 2004 transaction.

Second, the Debtor-Defendant asserts that the Plaintiff's reliance on the Assignment was not justifiable. By identifying shortcomings in the Assignment through an analysis of Georgia state law and Article 9 of the Uniform Commercial Code, the Debtor-Defendant argues that reliance on the written, notarized Assignment was not justifiable. However, "justifiable reliance requires the creditor to act appropriately according to his individual circumstances." City Bank & Trust Co. v. Vann (*In re Vann*), 67 F.3d 277, 284 (11th Cir. 1995). "The [justifiable reliance] inquiry will thus focus on whether the falsity of the

representation was or should have been readily apparent to the individual to who it was made."

4 Collier on Bankruptcy P 523.08[1][d] p. 523-44 (15th ed. 1999); see also Field v. Mans, 516 U.S. 59. This standard is not as exacting as reasonable reliance that uses an objective standard.

Therefore, the Debtor-Defendant's arguments relating to the Assignment's invalid form under the Uniform Commercial Code and Georgia law, without more evidence beyond the pleadings, are not persuasive when assessing the individual circumstances of the Plaintiff. The Plaintiff's affidavit that explicitly states that, "I would not have lent her the \$50,000.00 if I had known she didn't own the Macon property, and had no collateral to offer me." (Doc. No. 11, p. 7, ¶ 11). The Court finds that the affidavit and related undisputed facts support a finding of justifiable reliance. Finding that the remaining elements of actual fraud are satisfied in this transaction, the Court deems the \$50,000.00 debt owing to the Plaintiff nondischargeable under section 523(a)(2)(A) of the Bankruptcy Code.

As to the remaining debts, the Plaintiff fails to demonstrate that she is entitled to a judgment as a matter of law. The undisputed facts and supporting affidavits do not establish by a preponderance of the evidence that the Debtor-Defendant made a false statement or intended to deceive the Plaintiff in her promises to repay the loans made. It is firmly established in this Circuit that a breach of a mere promise to pay does not constitute false representation, false pretenses, or actual fraud. First National Bank of Mobile v. Roddenberry, 701 F.2d 927, 932 (11th Cir. 1983); FDS National Bank v. Alam (In re Alam), 314 B.R. 834, 837-38 (Bankr. N.D. Ga. 2004).

In assessing the initial \$20,000.00 loan, the Plaintiff's willingness to hold a post-dated check for over six months contradicts any assertion that Debtor-Defendant represented that she had sufficient funds to repay the debt. Regarding the \$10,400.00 sum loaned, the

Plaintiff states in her affidavit that the Debtor-Defendant told her that she was unable to pay. (Doc. No. 11, p. 7, ¶ 7).

The Plaintiff's other basis for nondischargeability is under section 523(a)(6). Again, the Plaintiff fails to meet her burden in proving "wilful and malicious" injury by the Debtor-Defendant. Section 523(a)(6) requires that the Plaintiff prove that the injury to her is deliberate or intentional, not merely an intentional act that leads to an injury. Kawaaauhau v. Geiger, 523 U.S. 57, 61 (1998). There are no facts that support a finding of nondischargeability under this subsection.

Because of the reasons set forth, the Court finds that the March 20, 2004 loan for \$50,000.00 be excepted from discharge under section 523(a)(2)(A). Accordingly,

**IT IS ORDERED** that the Motion be and is hereby **PARTIALLY GRANTED**, as set forth in this Order.

The Clerk's Office shall serve a copy of this Order to the Plaintiff, Plaintiff's Counsel, Defendant, Defendant's Counsel, and the Chapter 7 Trustee.

**END OF DOCUMENT**

